IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No: 05-CV-0329-GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE TO
DEFENDANTS' MOTION TO COMPEL

COMES NOW the Plaintiff, the State of Oklahoma, ex. rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (hereinafter "the State"), and submits this Response to "Defendants' Motion to Compel Plaintiff's Compliance with the Court's Order on Data Production" filed February 29, 2008 [DKT #1605].

I. INTRODUCTION

The State has in good faith fully complied and produced all of the testing results as required by the Court.[1] Defendants have it all. There is nothing to compel. With the production

[1] The sampling results produced through this process have included the testing results undertaken specifically for this litigation by CDM. In addition, several State agencies independent of this litigation have sampling programs within the IRW. Data from this sampling has been produced separately through agency productions. The State will continue to update those productions consistent with the Federal Rules.

this week, the production of the scientific data collected as a result of the State's sampling conducted to date is now complete and the Motion is moot.[2] Ex. 1.

Nothing has been hidden, and nothing will be hidden.

II. ARGUMENT

A. The State has fully complied with the Court's discovery order.

While the Motion to Compel is clearly moot, and should be denied as such, Defendants have made misleading assertions that warrant a response. For instance, pointing solely to the State's production in connection with its efforts to use DNA to track poultry waste to support their claim that the State has not fully complied with the Court's Order of January 5, 2007 [DKT #1016], Defendants seriously misrepresent the State's compliance with the Court's Order. The State, in producing its DNA testing results, has, in fact complied with that Order and has even gone beyond its requirements. There is no better example of the quality of its compliance with the Court's January 5 2007 Order than the State's production of the sampling results from its DNA investigation.

Beginning on February 1, 2007, and continuing to the present, the State has produced the scientific testing results developed through CDM's environmental sampling program as that data has completed the State's internal Quality Assurance / Quality Control ("QA/QC") process.[3] The

[2] CDM is likely to continue to do some limited sampling. When results from that sampling are received, this production will be promptly supplemented. The United States Geologic Survey is also continuing to do sampling for the State in the IRW and those results will also be updated as has been done previously.

[3] In addition to the QA/QC process, which is routine for the labs that do chemical and bacterial analysis, CDM, which oversees the State's sampling for this case and associated data collection efforts, has an internal QA/QC process, a necessary step to assure that the samples and resulting data have been properly handled. Amongst other things, this process checks to be sure that the necessary chain of custody forms have been completed and that the outside laboratories have conducted the appropriate tests and performed their own required

State has produced almost 50,000 pages of lab reports, chain of custody reports, field sheets, field books and quality assurance reports. It has produced the lab analysis for thousands of separate sampling events and the protocols under which the samples were collected. Defendants have been provided sampling results from nine different laboratories, including the QA/QC documents and the chain of custody forms. They have been provided the results of water quality sampling, bacteria data, chemical analysis, including testing for hormones, data on fish counts, and data concerning benthic and macroinvertebrate sampling. The production has also included thousands of pictures and the reports from hundreds of hours of observations by investigators. See Ex. 2. It has been a massive effort.

Ignoring the massive amount of other data that has been produced, Defendants point to the State's production of the data relating to the DNA investigation and claim that it presents the "most glaring example discovered thus far of Plaintiffs' [sic] concealment of data – and the duplicity underlying that concealment." Defendants' Brief, p. 4. In fact, the record of the State's production of DNA data reveals that the State has not only complied with the Court's January 5, 2007 Order, but has exceeded the requirements of that Order. It is, in fact, a very good example of the State's compliance with the Court's Order.

B. The State has properly asserted a privilege regarding its DNA investigation.

It is important for the Court to recognize, as set forth in detail in the subsequent section of this brief, that Defendants have been provided all of the data developed to date in the course of the State's efforts to track the movement of poultry waste using a DNA marker. Defendants have all of those results and had the first of them well in advance of the filing of the Motion for Preliminary Injunction and promptly after the testing of those samples was completed. Also, in

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QA/QC. Once this final QA/QC process is completed, the results are released to Defendants and simultaneously provided to the State's own experts for their consideration.

advance of the filing of the Motion for Preliminary Injunction, Defendants were given information on how the bio-marker was isolated, a detailed description of the test used to find the marker, and the sensitivity of those tests.

Contrary to Defendants' assertions, under the Opinion and Order of January 5, 2007, the State would have been well within its rights to withhold all of that information, including the testing results, at least until December 20, 2007 when it filed Dr. Harwood's Supplemental Affidavit in support of its Motion for Preliminary Injunction. *See* State's Notice of Filing of Supplemental Affidavit, December 20, 2007 [DKT #1416].

The January 5, 2007 Order provided:

> [T]he Court concludes that Plaintiffs shall produce and are hereby ordered to produce those documents described above as being included within Plaintiffs' most recent offer of voluntary production. Generally these documents are testing results for which any privilege has been waived as described in the "at issue" waiver described above. To compel production or responses beyond the voluntary production described above, i.e. attorney directed sampling plans and Plaintiffs' investigation of Defendants' waste disposal practices, will require the resolution of the attorney client and work product privileges and expert witness assertions which the Court is reserving for future decision, if necessary. After the Defendants have reviewed the production ordered herein and the revised privilege log described below, the Defendants may reurge their motion to compel further production if they think it necessary and appropriate. . . . Within one week of producing all of the documents identified by Plaintiffs and the Court, Plaintiffs shall prepare a supplemental privilege log which identifies all documents which Plaintiffs continue to claim as privileged which Plaintiffs have not produced.

Opinion and Order, DKT #1016, p. 10-11 (emphasis added).

Consistent with this Order, the State made its production and presented Defendants with a supplemental privilege log. Ex. 3. In its privilege log, the State clearly laid out its assertion of privilege as to Standard Operating Procedures and laboratory results related to their DNA investigation. In doing so, the State explained its assertion of privilege as follows:

> Plaintiff is investigating, through the use of established scientific methods, whether poultry waste can be tracked through a variety of media using DNA analysis.

Ex. 3, p. 5, see entries ##309, 312.[4]

Defendants did privately protest this assertion of privilege, to which the State responded:

> First, I will address your inquiry regarding our intentions relating to producing the data developed during the State's attempt to use accepted scientific methods to develop a method for investigating the extent to which DNA can be used to track poultry waste through a variety of media in the IRW. I do believe that the information that we are gathering at this stage of our DNA investigation is of a decidedly different character than the data we have produced. This is exactly the type of expert investigation that the Federal Rules protect. I also do not believe that it is covered either explicitly or implicitly by the Court's order.

(Ex. 4, Ltr. to George from Bullock, March 9, 2007) Tellingly, until they filed their present Motion, Defendants did not accept the Court's explicit invitation in the January 5 Order to return to Court and challenge that assertion of privilege. The State continued to maintain its position as to the privileged nature of this investigation until it had determined what DNA strand to test for and completed its first round of testing. Once those results were received they were produced on September 27, 2007. Ex. 5.

Defendants' conduct speaks volumes as to their recognition of the fact that the State's assertions of privilege were correct and that this investigation by its experts was explicitly protected by the Federal Rules. They further recognized by their silence that the Court's January 5, 2007 Order could not be read as either explicitly or implicitly requiring the production of

[4] The fact that the State was investigating whether it could track waste through the use of DNA was not a matter of public discussion before the Preliminary Injunction Hearing. Prior to that, there was no reliance upon the fact of this investigation in any fashion. It was not amongst the data relied upon in the filing of any pleadings prior to the filing of Dr. Harwood's affidavit on December 20, 2007. In fact, until early September 2007, when the first round of results confirmed that the State could track poultry waste using this particular DNA as a marker, the State did not know for certain that its efforts would bear fruit. There was no waiver as to this expert investigation.

information relative to this investigation.[5] Had they actually believed the State was in violation of the Order, they surely would have raised such a violation in a timely manner and not waited until after all of the DNA results had been produced. The State's assertion of privilege was appropriate.

C. The production of DNA testing results fully complied with the January 5, 2007 Opinion and Order.

Even if the State had not properly asserted a privilege claim as to its DNA investigation, the State still must be found to have fully complied with the Court's January 5, 2007 Order. It has, in fact, gone beyond the requirements of that Order.

First and foremost, all of the data relating to the PCR testing has been produced and produced in a timely manner. When the first round of testing was completed, a report was prepared on those testing results. This report was provided to Defendants on September 27, 2007. Ex. 5. On November 3, 2007, with the completion of the second round of testing, a second report on the outcome of that testing was prepared and delivered to Defendants. Ex. 6.[6] A third report was provided to Defendants on December 20, 2007 Ex. 7. The fourth and most recent report was provided January 28, 2008 as part of Dr. Harwood's considered materials. Ex. 8. This constitutes all of the testing results for this bio-marker that have been performed to date. Those four productions more than fully complied with the Court's Order. They not only reported the results, but in some detail they set out the methods used to extract the DNA; how the DNA from the bacteria was "amplified"; how it was detected; and the detection limits. What these

[5] The e-mails between the lab and Dr. Harwood, which appear to be the excuse for the filing of this motion, are taken out of context and misconstrued. That e-mail exchange, even taken out of context, does not suggest that the State's assertion of privilege was ill-founded or that anything has been improperly withheld.

[6] In order to expedite the production of these results to Defendants, this report was produced prior to being bates stamped. Ex. 6. The bates stamped copy was later substituted.

reports did not explain was why the State was interested in this particular DNA or more particularly why the State's experts believed the reported results were relevant to the movement of waste from Defendants' poultry operations through the environment of the IRW.

Under its plain terms, the Court's Order required the production of "testing results" and not the opinion of experts or an explanation as to how those opinions were formed. Contrary to this, what Defendants are urging is that the Court's Order purportedly tore back the sheets and required the State, beginning in February of 2007, to report in detail on the work their experts were performing to isolate a bio-marker and develop a protocol for testing for that marker. It did not. Even read in the broadest of terms, the Order did not require the State to keep Defendants abreast of their efforts to investigate whether there is a strain of bacteria found in poultry and not commonly found in cattle, swine, geese, ducks, or human waste so that they could actually track poultry waste in the environment.

While the State was not required to explain why it viewed these test results to be important, it in fact did so. The State did this beginning November 3, 2007, simultaneous with the production of the second round of test results. Ex. 9. Going well beyond what was required by the Court and well beyond what Rule 26 of the Federal Rules of Civil Procedure required to be produced at that time, the State provided not only the testing results, it provided Defendants with a 23-page report detailing the basis for the State's experts' opinion that the DNA from this particular strain of Brevibacteria provided a valid bio-marker for poultry waste. This is classic expert opinion evidence. The production of it was not required by the Court's Order and it was, in fact, provided well in advance of the Court ordered date for the production of such a report. The report given to Defendants on November 3, 2007, explained in step-by-step fashion how the experts reached the opinion that this particular DNA could be used as a marker to facilitate the

location of poultry waste as it moved through the IRW. The report also set out the process used in isolating this particular DNA and detailed why DNA from this bacterium was chosen while others were rejected. It went on to explain in detail how the tests for this marker were conducted, how that process was developed, and how the results were verified. In its own terms, the report explained:

> This report documents the identification of a potential poultry litter specific biomarker, confirmation of the specificity of that biomarker for poultry litter (as compared to other fecal material); and the development of quantitative polymerase chain reaction (qPCR) assay specific to detection of the poultry biomarker in various environmental media.

Identification of a Poultry Litter Specific Biomarker and Development of a Quantitative Assay, p. 1.

All of this was information Defendants wanted and to which they would have eventually been entitled. This report, though, was well in advance of any court requirement, providing what was clearly expert opinion and explaining the basis for that opinion.[7]

From the beginning, there was nothing covert or misleading about this. The State, by placing this on its privilege log, was open about the fact it was investigating to determine if a potential DNA marker could be identified. Once the State decided what DNA it should test for, how to conduct those tests, and received the results of those tests, the State produced those testing results. It then went further and voluntarily produced the basis on which its experts selected this bio-marker and explained why those results allowed the State to track poultry waste through the environment.

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[7] As part of producing the "considered" materials in association with the preliminary injunction, Plaintiff has also provided Defendants with the lab notes from the lab that performed the work locating this marker and testing for it in the environmental samples which had been maintained at -80 deg C. Where the State had enough of the samples left after completing this round of testing, the State also provided Defendants with splits of these samples.

The process of determining what might be a valid bio-marker that could be used to track poultry waste was a matter of investigating whether there was a bacterium that was contained in poultry waste that was not generally contained in the waste from cattle, swine, geese, ducks, human sewage or septic tanks. If such a strain of bacteria could be found, the State then needed to attempt to develop a protocol for testing environmental samples gathered in the IRW for a particular DNA sequence from these bacteria. Only if these steps were successful would a process through which anything that could meaningfully be called environmental data be created. It is elemental that before one can produce any testing results, one must determine what one is testing for and how to conduct the test. That was the basis for the claim of privilege, but, as stated above, once those steps were taken, all test results were promptly provided. There is no basis for this motion. Defendants have all of the DNA testing results required to be produced by the Court's Order of January 5, 2007. There is nothing to compel.

CONCLUSION

The Court should find that the State has fully complied with the Court's January 5, 2007 Opinion and Order as it relates to the production of sampling test results and deny the motion.

Respectfully submitted,

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I certify that on the 25th day of March, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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